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No. 85-637

IN THE

Supreme Court of the United States

October Term, 1985

DONALD P. HODEL, SECRETARY, DEPARTMENT OF INTERIOR, AND HIS AGENTS, ASSIGNS AND SUCCESSORS IN OFFICE,

Appellant,

v.

MARY IRVING, PATRICK PUMPKIN SEED, EILEEN BISCONETTE AS GUARDIAN FOR DUANE CROSS, ANTHONY CROSS, FAITH CROSS AND ALL OTHERS SIMILARLY SITUATED,

Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE YAKIMA INDIAN NATION, and BRIEF OF THE YAKIMA INDIAN NATION, AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Confederated Tribes and Bands of the Yakima Indian Nation, herein referred to as the Yakima Indian Nation, hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the appellees has been orally received per telephone call November 26, 1985. The consent of the attorney assigned to the case by the Solicitor General was

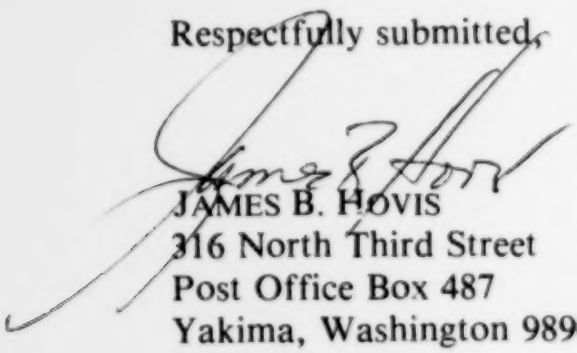
likewise requested per telephone call this date but while that request was not refused, said attorney advised that this request should be addressed to the Solicitor General in writing. This was done on said November 26, 1985, and the results of this written request will be furnished under separate cover as soon as it is received.

The interest of the Yakima Indian Nation is the protection of its members' interests from the provisions of 25 U.S.C. Section 2206 (1982) and the Act of October 30, 1984, Pub. L. 98-608 (H.J.R. 158), 98 Stat. 3171, 3173, which provide that small shares of land allotted in trust to individual members of the Yakima Indian Nation may not pass by intestacy or devise but instead escheat to the Yakima Indian Nation. This position was taken by a General Council of the Yakima Indian Nation, at which all adult members may attend and vote, by a vote of 268 for this position and a vote of 2 against this position. This interest is the same as the appellees and the Oglala Sioux Tribe, who filed a brief amicus in the Court of Appeals for the Eighth Circuit. They, like the Yakima Indian Nation, do not want the interests taken from its members without compensation, even though the interests would go to the benefit of the tribe. Right is right, and the Yakima Indian Nation would like to add its voice in support of the determination by said Eighth Circuit Court of Appeals. Further, the Yakima Indian Nation wishes to raise the question of congressional breach of fiduciary responsibility as a basis for the unconstitutional determination of said Court. Appellees have based their arguments more on the issue of the taking of vested interests.

Undersigned counsel for your petitioning amicus has practiced before this honorable Court both on plenary and

summary matters and it is believed by the Yakima Indian Nation that an amicus brief can add to the determination of this important matter without delaying or hampering this Court's decision.

Respectfully submitted,



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Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE YAKIMA INDIAN NATION, AS AMICUS CURIAE

I.

INTEREST OF AMICUS CURIAE

The Confederated Tribes and Bands of the Yakima Indian Nation, herein referred to as the Yakima Indian Nation, is an Indian tribe located in the south central part of

the State of Washington. The Yakima Indian Nation's status as a sovereign entity was reserved in the June 9, 1855 *Treaty with the Yakimas* (12 Stat. 951), which was ratified on March 8, 1859 and proclaimed on April 18, 1859. From lands ceded to the United States, exceeding ten million acres, the *Treaty with the Yakimas* also reserved the Yakima Indian Reservation with a total area of 1,367,105 acres. Of this reservation total, the Yakima Indian Nation owns 842,978 acres. Individual Indians are allotted 274,988 acres and the remaining 249,416 acres are held in non-trust or non-restricted title by others — mostly non-Indians.

Since 1955, under the Act of July 28, 1955, 69 Stat. 392, as amended by the Act of August 31, 1964, 78 Stat. 748 (25 U.S.C. Secs. 608-608c), the Yakima Indian Nation has expended over fifty-five million dollars to purchase trust lands from allottees under a land consolidation enterprise. Under the Act of August 9, 1946, 60 Stat. 968, and an amendment of Section 7 of that Act by the Act of December 31, 1970, 84 Stat. 1874 (25 U.S.C. 607), the Yakima Indian Nation has acquired, and is now purchasing, the interests of members and non-members not possessing the necessary one-fourth blood quantum of the antecedent tribes and bands. This action provides for the consolidation of fractionated interests, fosters fair enrollment practices and provides fair compensation for tribally-acquired interests.

The Yakima Indian Nation's land consolidation and enrollment practices have promoted land consolidation, thereby reducing federal expenditures regarding administration of fractionated interests in Yakima Reservation allotments. As the Government has noted, reduction of federal expenditures is a primary purpose of Section 207 of the Land Consolidation Act, 25 U.S.C. 2206, and Section 207 of the Act of October 30, 1984, Pub. L. 98-608, 98 Stat. 3173, (25 U.S.C. 483a). Jurisdictional Statement pp. 7, 22 n.5.

The Yakima Indian Nation's land consolidation plan and the foregoing federal laws, which are the foundation of this plan, foster consolidation and further provide that the heirs receive compensation for tribally-acquired interests. The provisions now before this Court, 25 U.S.C. 2206, save the United States monies involved in administering fractionated interests; but these provisions do so arbitrarily and in violation of the United States' fiduciary responsibility, thus unconstitutionally placing the entire financial burden of this federal saving on individual Indians. It is this effect of 25 U.S.C. Section 2206 on the members of the Yakima Indian Nation and other Indians that the Yakima Indian Nation opposes and is the reason that Appellees' Motion to Affirm is supported by this brief.

II.

ARGUMENT

The holding of the Court of Appeals for the Eighth Circuit is correct. Reasoning that supports the Court of Appeals' determination that there exist vested rights entitled to protection of the Fifth Amendment is covered in that opinion and in the Motion to Affirm. Transcending said determination, the holding of the Court of Appeals should be sustained regardless of the existence or non-existence of vested property interests.

Inherent in the Court of Appeals holding 25 U.S.C. 2206 unconstitutional is this Court's requirement that the constitutional legislative power of Congress — regarding Indian property — must be tied rationally to the trust obligations of the United States. The unilateral placing of the cost burden of consolidation on these Indian wards for the financial benefits of consolidation flowing to the trustee is

contrary to this fiduciary relationship and is violative of this constitutional limitation on Congress. Legalisms abound in the decisions below and in the Jurisdictional Statement; but underlying the section under attack is the bottom line that Congress abused the trust responsibility to Indians that is the basis of its legislative power over alienation of the trust properties involved.

This guardian-ward relationship was first noted by this Court in *Cherokee* v. *Georgia,* 30 U.S. (5 Pet.) 1 (1831). This Court has continued to construe statutes under this indisputable existence of a general trust relationship between the United States and the Indian people. *United States* v. *Mitchell,* 463 U.S. 206, 225 (1983).

Indeed it is this guardianship theory that this Court distinctly relied upon as the basis for congressional power over Indians. *United States* v. *Kagama,* 118 U.S. 375 (1886). While this Court has not cited trust responsibility as the sole source of congressional power since *United States* v. *Candelaria,* 271 U.S. 432 (1926), this Court has made it clear that the constitutional standard for judicial review of Indian legislation is whether the legislation under attack serves this fiduciary responsibility. *Delaware Tribal Business Community* v. *Weeks,* 430 U.S. 73, 83-85 (1977).

In *Delaware Tribal Business Community* v. *Weeks, supra,* this court rejected arguments seeking to establish that the power of Congress is so pervasive as to render its legislation not subject to judicial constitutional review. Instead, this Court held that the constitutional standard for judicial review was whether the legislation under attack was "tied rationally to the fulfillment of Congress' unique obligations toward Indians". 430 U.S. at 85. Where Congress is exercising its authority over Indians rather than some other distinctive power, this trust obligation requires that its statutes be based on a determination that the Ind-

ians will be protected. Otherwise, such statutes are not rationally related to the trustee obligation. *United States* v. *Sioux Nation,* 448 U.S. 471 (1980).

Under the admitted facts of the attacked escheat section enactment, Congress did not make good faith efforts to protect its Indian wards and see that they receive full value. This is the approved test of this Court in *United States* v. *Sioux Nation, supra.* It is clear that Congress was more interested in reducing administrative obligations of the United States than in protecting its wards. In other words, Congress was looking out for the interests of the United States, not those of its wards. Requiring that compensation be given for the interests flowing to the tribes would have been very easy for Congress to do. Congress has so provided in the legislation regarding interests flowing to the Yakima Nation under land consolidation legislation pertaining to the Yakima Reservation. 25 U.S.C. Sec. 607. The Government describes the interests that are lost as de minimus. If they are so de minimus, tribes could readily provide funds for adequate compensation. Further, there was no showing that Congress could not, in its own as well as its wards' interests, provide funds for acquisition to reduce administrative costs that was so clearly the primary goal of Congress. In the enactment of 25 U.S.C. 2206, Congress was fostering the interests of the United States, not its Indian wards; therefore, the statute is unconstitutional.

III.

CONCLUSION

Appellees' Motion to Affirm should be granted.

Respectfully submitted,

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Dated: December 5, 1985